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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/717,768	11/20/2003	Jay C. Landsiedel	US20030359	8877

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EXAMINER

MCALEAVEY, ANDREW JAMES

ART UNIT PAPER NUMBER

1746

DATE MAILED: 08/31/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/717,768	<b>Applicant(s)</b> LANDSIEDEL ET AL.	
	<b>Examiner</b> Andrew McAleavey	<b>Art Unit</b> 1746	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-39 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 November 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## **DETAILED ACTION**

### ***Specification***

1. The disclosure is objected to because of the following informalities: in the section entitled "Brief Description of the Drawings," a brief description of Figure 6 is missing.

Additionally, in paragraph [0049], "in the optimal positioned" is grammatically incorrect and should be amended to read "in the optimal position." In paragraph [0054], "when the utensils a side wall than" is confusing and should be corrected. Also, at line 21 of paragraph [0054], the specification refers to "Figures 112A-D," which do not exist. The Examiner suggests that the phrase be amended to read "Figures 12A-D."

Appropriate correction is required.

The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.

### ***Drawings***

2. The drawings are objected to because the lead line for reference numeral 34 in Figure 2, which purportedly indicates the water spray assembly, does not terminate on or near the water spray assembly, and thus renders the drawing confusing. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the

sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 14-19 and 21-39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 19 and 38 recite the limitations "the first rack position" and "the second rack position." There is insufficient antecedent basis for these limitations in those claims.

Claims 14 and 33 recite the limitation "the use position" in line 2. There is insufficient antecedent basis for this limitation in those claims. None of the claims from

which claims 14 and 33 depend recites a "use position." The Examiner notes that claims 12 and 31, respectively, recite "multiple use positions."

Claim 21 recites the limitation "the at least one side sprayer" in line 12. There is insufficient antecedent basis for this limitation in the claim. Claim 21 does not positively recite side sprayers.

Claims 15-18, 20, 22-32, 34, 35-37, and 39 are rejected based on their dependencies, but would be definite if the claims from which they depend were amended so as to be definite.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 21, 23-32, and 39 are rejected under 35 U.S.C. 102(b) as being anticipated by Fiocca et al., U.S. Patent No. 3,752,322 (hereinafter "Fiocca").

Fiocca discloses a utensil basket (20; Figure 1) comprising a bottom wall (Figure 1; defined by the members 24 and 26 shown individually in Figure 2) and a peripheral wall (shown in Figures 1 and 2) which define an open-top utensil holding space (clearly shown in Figure 1). Multiple tines (38; Figure 4) are provided in the utensil holding space. With respect to these features, see also Fiocca at column 2, lines 18-65.

Fiocca also discloses an adjustable utensil carrier in the form of a wire frame wall spanning the utensil holding space of the utensil basket by spanning between sidewalls

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of the utensil basket (member 36 and associated structures shown in Figure 2; see also column 3, lines 8-45). The adjustable utensil carrier is adjustable relative to the bottom of the utensil basket to form an inclination angle relative to the bottom wall of the utensil basket (as is clearly shown in Figure 2, retaining member 45 allows member 36 to be adjusted to a number of angular orientations). As can be appreciated from Figure 3, some of the positions allowed by retaining member 45 form acute angles with respect to the bottom of the utensil basket; other positions of the utensil carrier structure are clearly generally perpendicular to the utensil basket. The adjustable utensil carrier of Fiocca is, in general terms, pivotally mounted to the utensil basket, and is specifically hingedly mounted to the utensil basket (see Figure 3; column 2, lines 57-67 and column 3, lines 50-55).

The Examiner interprets retaining member 45 of Fiocca as being a detent latch having multiple detents in which "a portion of the side wall [in this case, lever 43 of Fiocca] is received to hold the wire frame wall in the cleaning position," as recited in claims 11 and 30. As was noted above with respect to retaining member 45 of Fiocca, each of the detents or slots in that member establishes a different angular position of the adjustable utensil carrier. Furthermore, with respect to claims 13 and 32, the Examiner interprets lever 43 of Fiocca (shown in Figure 2) as being an actuator that couples the support wall to the peripheral wall for moving the support wall into a cleaning position.

With respect to the limitation of claim 21 that "the adjustable utensil carrier can be positioned such that a food contact surface of the utensil is exposed," the Examiner's

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position is that this limitation represents a function of the recited structure. Moreover, the Examiner believes that the recited function can be performed by the apparatus of Fiocca because the apparatus of Fiocca includes all of the structural elements recited in the claim. See *In re Swineheart*, 169 USPQ 226 (CCPA 1971); *In re Schreiber*, 44 USPQ2d 1429 (Fed. Cir. 1997).

As to the preamble recitation of claim 21 that the utensil basket is "for a dishwasher comprising at least one side sprayer and a rotating water spray assembly for washing utensils," the Examiner's position is, first, that the preamble does not limit the claim and, second, that this particular recitation is nothing more than an intended use. Although the preamble does not limit the claim in this instance and thus has not been accorded a great deal of patentable weight, the Examiner notes that the apparatus of Fiocca appears to be fully capable of the recited intended use. See MPEP 2114 and *Ex Parte Masham*, 2 USPQ2d 1647 (BPAI 1987).

Accordingly, Fiocca anticipates claims 21, 23-32, and 39.

### ***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fiocca. Fiocca is applied as above in the rejection under Section 102.

Fiocca does not expressly disclose an inclination angle of 35 degrees with respect to the utensil basket. However, in Figure 3 of Fiocca, it can readily be seen that Fiocca does provide for a variety of inclination angles, some of which appear to approach 35 degrees. In view of the disclosures of Fiocca, it would have been obvious to provide an inclination of 35 degrees in order to retain a dish at that angle for optimum exposure to cleaning sprays. The Examiner notes that Applicants have not established any particular criticality to the angle of 35 degrees.

9. Claims 1-13 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Applicants' Admitted Prior Art (hereinafter "AAPA") in view of Fiocca. Fiocca is applied as above in the rejections under Sections 102 and 103. As to AAPA, in the background section of Applicants' specification, particularly in paragraphs [0002] and [0003], Applicants explicitly admit that:

Automatic dishwashers are well known, especially those for use in household environments. A typical automatic dishwasher comprises a cabinet that defines a washing chamber, which is accessible through a moveable door. Typically, an upper and a lower basket for holding cooking utensils to be cleaned are provided within the washing chamber. Larger utensils, such as plates, platters, and cooking pans, are frequently placed in the lower basket, with smaller utensils in the upper basket. Wash liquid is typically directed into the washing chamber through a rotating lower water spray assembly at the bottom of the washing chamber and an upper spray assembly at the top of the washing chamber. The lower spray assembly is positioned beneath the lower basket and its spray is directed up through the bottom of the basket. The upper spray assembly can be located above or below the upper basket, with its spray being directed downward or upward, respectively.

To enhance the cleaning of larger utensils, particularly cooking pans having baked on or burned food particles adhering thereto, some dishwashers are provided with a



series of spray nozzles positioned along the walls of the dishwasher to spray wash liquid generally laterally toward the interior of the lower basket. The lateral spray is normally directed over and through the sides of the lower basket. Utensils placed in the lower basket are thus cleaned by water sprayed from both the rotating water spray assembly beneath the basket and the lateral spray from the side nozzles.

Thus, AAPA clearly discloses a dishwasher having a tub, a door, a utensil basket, a water spray assembly, and at least one side sprayer. AAPA does not disclose an adjustable utensil carrier. However, for the reasons set forth above, Fiocca discloses an adjustable utensil carrier that reads on the features recited in claims 1-13 and 20.

Specifically, the Examiner notes that except for the positive recitation of dishwasher structure in claim 1, claims 1-19 are similar to claims 21-39. Therefore, for the same reasons as given above in the rejections set forth above over Fiocca, as well as those given above with respect to AAPA, the combination of AAPA and Fiocca discloses and/or suggests all of the features of claims 1-13 and 20. Moreover, it would have been obvious to use the adjustable utensil carrier of Fiocca in the dishwasher of AAPA in order to maximize the exposure of dishes to cleaning solutions, and also in order to increase retention of the dishes and minimize shifting during washing. Accordingly, the combination of AAPA and Fiocca renders claims 1-13 and 20 obvious.

***Allowable Subject Matter***

10. Claims 14-19 and 33-38 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

11. The following is a statement of reasons for the indication of allowable subject matter: the prior art of record does not disclose or suggest an adjustable utensil carrier having an actuator with an over-center latch.

***Conclusion***

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Each of the cited prior art references discloses a dishwasher rack with pivotable dividers or portions.

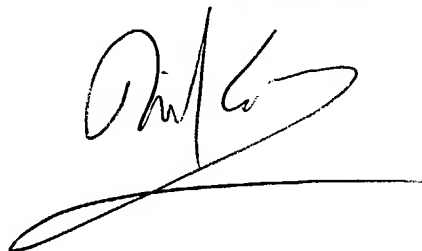
13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrew McAleavey whose telephone number is 571-272-0542. The examiner can normally be reached on Monday through Friday, 8:00AM - 4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Barr can be reached on 571-272-1414. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

AM  
8/30/04  
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**MICHAEL BARR**  
**PRIMARY EXAMINER**

A handwritten signature in black ink, appearing to read 'Michael Barr', with a long horizontal flourish extending to the right.